STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE FARINO,

Plaintiff-Appellee,

v

RENAISSANCE CLUB and JOHN GUY,

Defendants-Appellants.

UNPUBLISHED
June 29, 1999

No. 206031
Wayne Circuit Court
LC No. 95-507399 CZ

Before: Doctoroff, P.J., and Markman and J. B. Sullivan*, JJ.

PER CURIAM.

In this obesity discrimination action, defendants appeal as of right from a judgment, following a jury trial, awarding plaintiff $275,191.50, and denying defendants' motion for judgment notwithstanding the verdict (JNOV), new trial, or remittitur. We reverse.

Plaintiff, who at all relevant times was overweight, was hired by defendant Renaissance Club (RC) as an accounting clerk. Defendant Guy, RC's manager, later hired plaintiff as a club secretary. When plaintiff returned from medical leave, Guy transferred her to the position of day receptionist, where she remained for sixteen months. Because of plaintiff's lackluster performance and members' complaints, and at the recommendation of relatives of plaintiff's, Guy later transferred her to the position of night receptionist. Plaintiff did not want to work the later shift and stated that she would quit once she found another job. When plaintiff refused to set a firm date for her departure after several requests for such a date, Guy did so himself. Plaintiff claims that Guy's action constituted an involuntary termination of her employment and was motivated by a discriminatory animus based on her weight in violation of MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).

Assuming, without deciding, that the trial court properly submitted the question whether plaintiff left RC's employ voluntarily or involuntarily to the trier of fact, see *Middleton v Arkansas Employment Security Div'n*, 265 Ark 11, 13-14; 576 SW2d 218 (1979), we find that trial court nonetheless erred in denying defendants' motion for JNOV because plaintiff failed to make out even a prima facie case of discrimination. "In reviewing a motion for JNOV, this Court views all evidence in a

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

light most favorable to the nonmoving party." *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). "Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for [JNOV] be granted." *Nabozny v Pioneer State Mutual Ins Co*, 233 Mich App 206, 209-10; 591 NW2d 685 (1998). If, however, reasonable jurors could honestly have reached different conclusions, the jury verdict must be allowed to stand. *Severn, supra* at 412.

A prima facie case of discrimination can be established by proof of intentional discrimination or disparate treatment. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994). To establish a disparate treatment claim, the plaintiff must prove that she was a member of a protected class and that she was treated differently than persons of a different class for the same or similar conduct or performance. *Id.*; *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991). The plaintiff's weight need not be the only reason, or even the main reason, for the adverse employment decision, but it does have to be a motivating factor. Cf. *Reisman, supra* at 539; *Lamoria v Health Care and Retirement Corp*, 233 Mich App 560; __ NW2d __ (1999), adopting 230 Mich App 801, 808-09; 584 NW2d 589 (1998)(*Lamoria* I). To be similarly situated, "all of the relevant aspects" of plaintiff's employment situation must be "nearly identical" to those of the employee(s) with whom she compares herself. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997) (Brickley, J). See also *Mitchell v Toledo Hospital*, 964 F2d 577, 583 (CA 6, 1992).

Plaintiff here sought to compare herself with Rosie Moncivais, an average-weight woman who also worked as a receptionist and reported to the same supervisors. Plaintiff, who admittedly did not like dealing with the public, was the subject of several complaints by members regarding the way she treated them. Although Moncivais' performance review indicated that she had a negative attitude, it also noted that she "displays a desire to be of service." Unlike in plaintiff's case, there was no mention of member complaints regarding Moncivais' attitude. Nevertheless, Moncivais was transferred to the night shift because of performance problems, just as plaintiff was. She accepted the transfer, whereas plaintiff objected to it and stated that she intended to leave imminently if she were not returned to the day shift. Thus the evidence shows that plaintiff and Moncivais were *not* similarly situated in terms of their performance problems, yet *were* treated the same, i.e. transferred to the night shift. Once on the night shift, plaintiff and Moncivais were not similarly situated because Moncivais accepted the change whereas plaintiff did not and indicated her intent to quit. It was that threat that led eventually to the termination of her employment. There was no evidence that Moncivais (or any other employee) made a similar threat but was not ultimately discharged. To the contrary, Moncivais was urged to quit but refused. Therefore, plaintiff has failed to establish discrimination as the result of disparate treatment.[1]

To prove purposeful discrimination, the plaintiff "must show that she was a member of a protected class, that she was discharged or otherwise discriminated against with respect to employment, that the defendant was predisposed to discriminate against persons in the class, and that the defendant acted upon that disposition when the employment decision was made." *Coleman-Nichols, supra.* In a case involving direct evidence of discrimination, the plaintiff bears the burden of proving both the discriminatory animus and its causal nexus to the challenged employment decision. *Harrison v Olde Financial Corp*, 225 Mich App 601, 612-13; 572 NW2d 679 (1997). "While the continuous

use of racial or ethnic slurs may be sufficient for finding liability for discrimination, occasional or sporadic instances of such conduct are insufficient." *Sargent v International Bhd of Teamsters*, 713 F Supp 999, 1017 (WD Mich, 1989). In *Hong v Children's Memorial Hosp*, 993 F2d 1257, 1266 (CA 7, 1993), the court stated:

> Evidence of a supervisor's occasional or sporadic use of a slur directed at an employee's race, ethnicity, or national origin is generally not enough to support a claim under Title VII. We have held that such remarks, when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decision maker. [Citations and footnote omitted.]

Thus, absent evidence that "the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of discriminatory discharge." *McCarthy v Kemper Life Ins Cos*, 924 F2d 683, 686-87 (CA 7, 1991).

The evidence against Guy, taken in a light most favorable to plaintiff, includes the following: (1) in 1988 and 1989-- at least four or five years prior to plaintiff's termination in April 1993-- while plaintiff was still club secretary, Guy noted a concern in her performance reviews about plaintiff's weight. The remarks, which were made in the context of a concern for plaintiff's overall health, were not hostile or derogatory and, in our judgment, are not evidence of a weight-based animus. *Lamoria 1, supra* at 810 n 8;[2] (2) at unspecified times, although apparently at least one year prior to plaintiff's departure, an instance occurred in which Guy imitated the sight and sound of plaintiff's walk in a common area, causing other employees to laugh; and (3) at an unspecified time, although apparently at least one year prior to plaintiff's departure, Guy remarked that plaintiff was fat and stunk. The act of imitating plaintiff's walk, and the remark that she was fat and stunk were indeed derogatory and thus may be considered evidence of weight-based animus. *Lamoria*, *supra*, at 810. However, they predated plaintiff's termination by at least a year or more; they did not indicate any aversion to employing overweight people or any intention to terminate plaintiff's employment; and they were not made in reference to any employment decision. In our judgment, these were entirely isolated and stray remarks, wholly unrelated to the employment process. In particular, we again emphasize that Guy never raised the issue of terminating plaintiff's employment until she affirmatively announced her intention to quit.

In conjunction with these occurrences, we also have the following facts in evidence: (1) plaintiff was placed in two responsible positions by Guy, including one as his personal secretary, when she weighed at least 300 pounds; (2) Guy employed three former receptionists whose weight was apparently comparable to that of plaintiff; (3) Guy demonstrated considerable kindness and respect toward plaintiff on several occasions, including during difficult periods of medical care and treatment of plaintiff; and (4) despite considerable evidence that plaintiff was not performing her job at the highest standards, including statements from plaintiff herself that she did not enjoy dealing with the public, Guy never sought to terminate plaintiff and only imposed a final work date upon her after she indicated her intention to leave but repeatedly refused to supply a final work date on her own.

We conclude that the evidence here was insufficient as a matter of law to enable a rational trier of fact to find that Guy or the RC acted with a discriminatory animus in terminating plaintiff's employment and, therefore, that the trial court erred in denying defendants' motion for JNOV.[3]

Reversed.

/s/ Martin M. Doctoroff
/s/ Stephen J. Markman
/s/ Joseph B. Sullivan

[1] We assume for the purpose of the instant analysis that, although indicating her intention to resign at some indeterminate time, plaintiff was involuntarily discharged here because her final working date was eventually imposed upon her by defendant. However, it is hardly clear that, once an employee has announced his or her intention to quit a position, that an employer must invariably allow the employee to determine the specific departure date at the risk of being responsible for the employee's 'firing.' See *Schultz v Oakland Co*, 187 Mich App 96, 102; 466 NW2d 374 (1991); *Middleton v Arkansas Employment Security Div'n*, 265 Ark 11; 576 SW2d 218 (1979). It is not difficult to envision potential morale or dissension problems that may arise where an employer is compelled to await a lame-duck employee's decision on a final working date.

[2] "[W]e would not expect trial courts faced with motions for summary disposition on claims of weight discrimination to ignore real differences between the characteristics of race and weight. Race is basically an immutable characteristic; being of a particular race is not a negative attribute. In contrast, weight is an aspect of oneself that is subject to some control by one's conduct. It is common knowledge that many health professionals advise against being 'overweight.' Accordingly, comments that could reasonably be taken as mere advice about diets and the like do not amount to expressions of animus sufficient to indicate a likelihood that one would engage in illegal weight discrimination."

[3] Because of our decision, it is unnecessary to deal with defendants' contentions that the trial court reversibly erred in allowing one witness to testify about alleged anti-union efforts on the part of defendants not involving plaintiff; in refusing to allow defendants to cross-examine that same witness through the use of her personnel file; in refusing to allow the admission of classified ad evidence concerning employment opportunities in the Detroit area; and in refusing to instruct the jury on the issue of mitigating damages.